

IN THE PRIVY COUNCIL.

IN APPEAL FROM THE SUPREME COURT OF
BRITISH COLUMBIA.

BETWEEN WILLIAM K. BULL, APPELLANT,

AND

WING CHONG, *alias* CHU LAY, RESPONDENT.

TO THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL:—

The humble petition of William K. Bull, of the City of Victoria, Province of British Columbia, sheweth—

1. That on the 18th day of February, A.D. 1884, the Legislature of the Province of British Columbia passed an Act intituled "An Act to Regulate the Chinese Population of British Columbia," a copy of which is hereunto annexed. The said Act hereinafter referred to as "The Chinese Regulation Act, 1884," was not disallowed by the Governor-General of Canada in Council, and came into force on the 18th February, 1885.

2. That on the 4th day of June, A.D. 1885, Edwin Johnson, Esquire, one of Her Majesty's Justices of the Peace for the said Province and Police Magistrate of the City of Victoria, on the information of your petitioner, a Chinese collector duly appointed under the said Act, convicted one Wing Chong, *alias* Chu Lay, the above-named respondent, for that he, the said Wing Chong, *alias* Chu Lay, on the 21st day of May, 1885, at Victoria, in the said Province, being a Chinese within the meaning of the "Chinese Regulation Act, 1884," was found not having in his possession a license issued under the provisions of the said Act, lawfully issued to him, and fined the said Wing Chong, *alias* Chu Lay, for his said offence the sum of twenty dollars.

3. That on the third day of July, A.D. 1885, at the instance of the respondent, a writ of *certiorari* issued out of the Supreme Court of British Columbia, commanding the said Edwin Johnson to return into the said Supreme Court of British Columbia all and singular the informations, examinations and depositions taken by the said Edwin Johnson in the said case against Wing Chong, *alias* Chu Lay.

4. That on the return of the said writ of *certiorari*, the Honourable Mr. Justice Crease, one of the Judges of the Supreme Court of British Columbia, quashed the conviction, on the grounds, *inter alia*, that the said "Chinese Regulation Act, 1884," was *ultra vires* the Legislative Assembly of the Province of British Columbia.

The reasons given by His Lordship are more fully set out in his judgment, a transcript of which is hereunto annexed.

5. The order quashing the said conviction was not drawn up or served by the respondent until the 13th day of January, A. D. 1885.

6. Your petitioner is advised, and verily believes, that there is no appeal from the decision of the said the Hon. Mr. Justice Crease to the Supreme Court of British Columbia, sitting as a Full Court.

7. That although the amount of the fine imposed by the conviction is small, the question in issue is of great public importance, involving, as it does, the power of the Provincial Legislature, under the "British North America Act 1867," to discriminate in the imposition of direct taxation for purposes of Provincial revenue and police.

8. The proceedings against the respondent, and this appeal, have been undertaken by your petitioner at the instance and by direction of the Government of the Province of British Columbia.

9. That a transcript of all the proceedings in this matter is herewith transmitted to Your Majesty in Council.

Your petitioner, therefore, most humbly prays: That Your Majesty in Council will be pleased to order that your petitioner shall have special leave to appeal from the said order of the Hon. Mr. Justice Crease, of the 21st August, 1885,

And that Your Majesty will be pleased to take his said appeal into Your Majesty's most gracious consideration, and to grant him Your Majesty's Order of Summons upon the said respondent to appear and put in his answer thereto, and that service of the said Order of Summons upon the agent of the said respondent may be deemed good service, and that the said order of the Hon. Mr. Justice Crease of the 21st August, 1885, may be reversed, or that your petitioner may have such further and other relief as to your wisdom shall seem meet.

And your petitioner will ever pray.

Dated the 19th day of January, A. D. 1886.

W. K. BULL.

ALEX. E. B. DAVIE,

H. M. Attorney-General for British Columbia.

IN APPEAL
FROM THE
SUPREME COURT OF BRITISH COLUMBIA.

BETWEEN WILLIAM K. BULL, APPELLANT,
AND
WING CHONG, *alias* CHU LAY, RESPONDENT.

I, Henry Pering Pellew Crease, one of the Judges of the Supreme Court of British Columbia, herewith transmit all proceedings, examinations and depositions in the matter of a conviction of one Wing Chong, *alias* Chu Lay, under the "Chinese Regulation Act, 1884," by Edwin Johnson, Esq., Police Magistrate in and for the City of Victoria, B. C.,—the writ of *Certiorari*—the order quashing the said conviction, and my judgment on making the order.

HENRY P. PELLEW CREASE, J. [L.S.]

Affidavit of Service of Notice of Application for Writ of Certiorari

IN THE SUPREME COURT OF BRITISH COLUMBIA.

In the matter of Wing Chong, *alias* Chu Lay, on application for writ of *Certiorari*.

I, Chartres C. Pemberton of Victoria, clerk to Messrs. Drake, Jackson & Helmcken, make oath and say:—

That I did on the 5th of June, instant, personally serve Edwin Johnson with a copy of the notice hereto annexed, marked A, by delivering the same to him.

The said Edwin Johnson is the Police Magistrate mentioned in the said notice, and he was the only Magistrate who tried the complaint against Wing Chong, otherwise Chu Lay, and the only Magistrate present by and before whom the conviction was made.

(Signed) C. C. PEMBERTON.

Sworn before me at the City of Victoria, British Columbia, this
12th day of June, A.D. 1885.

(Signed) D. M. EBERTS,

*A Commissioner authorized to administer oaths, Supreme Court of
British Columbia.*

IN THE SUPREME COURT OF BRITISH COLUMBIA.

[L. S.]

On the application of Wing Chong, otherwise Chu Lay, for a writ of *Certiorari*.

Monday, 15th June, 1885.

Upon application of Mr. Richards, Q. C., and upon reading the affidavit of C. C. Pemberton, with the exhibit thereto filed this day, it is ordered that Monday, the 22nd day of June, be given to Edwin Johnson, Esq., Police Magistrate and Justice of the Peace in and for the City of Victoria, in the Province of B. C., to shew cause why a writ of *Certiorari* should not issue to remove into this Court a certain record of conviction made under the hand and seal of the said Edwin Johnson, as such Police Magistrate as aforesaid, and dated the 4th day of June, 1885, whereby Wing Chong, otherwise Chu Lay, was convicted of not having in his possession a licence under the "Chinese Regulation Act, 1884," and was fined \$20, upon the grounds, amongst others:—

1. That the Act under which the said conviction purports to have been made is *ultra vires* the local legislature as being an interference with the rights of Aliens.

2. That it is an interference with trade and commerce.

3. An infraction of the existing treaties between the Imperial Government and China.

4. That the taxation imposed by the said Act is unconstitutional as being unequal.

And why, in case the said rule is made absolute, the said conviction should not be quashed without the issuing of the writ.

By the Court.

(Signed) JAMES C. PREVOST, R.,
per HARVEY COMBE,
D. R. S. C.

Affidavit of Service for Rule Nisi for Writ.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

On the application of Wing Chong, otherwise Chu Lay, for a writ of *Certiorari*.

I, Chartres C. Pemberton of Victoria, British Columbia, clerk to Messrs. Drake, Jackson & Helmcken, make oath and say:—

That I did on Monday, the 15th day of June, instant, personally serve Edwin Johnson, Esq., Police Magistrate for the City of Victoria, with a true copy of the paper writing hereunto annexed, marked A,

by delivering said copy to and leaving the same with the said Edwin Johnson at the City of Victoria aforesaid.

(Signed) C. C. PEMBERTON.

Sworn at Victoria this 16th day of June, A.D. 1885, before me.

(Signed) D. M. EBERTS,

A Commissioner for taking affidavits in Supreme Court of British Columbia.

Enter within rule for argument.

Dated June 20th, 1885.

(Signed) DRAKE, JACKSON & HELMCKEN,
Solicitors for WING CHONG.

Return to Writ of Certiorari.

The execution of this Writ appears in a certain Schedule hereunto annexed. The answer of Edwin Johnson, Esquire, the Justice and Police Magistrate within mentioned.

THE SCHEDULE ABOVE REFERRED TO.

1. Information.
2. Deposition of Witness.
3. Conviction.
4. Reasons for conviction.
5. Notice of application for Writ.
6. Writ.
7. Recognizance.

(Signed) EDWIN JOHNSON, P.M.

Please enter within writ for argument before the Honourable Mr. Justice Crease for Friday, 10th day of July instant, at 11 A.M.

Dated 7th July, 1885.

(Signed) DRAKE, JACKSON & HELMCKEN,
Solicitors for WING CHONG.

I. INFORMATION

CANADA,
CITY OF VICTORIA,
PROVINCE OF BRITISH COLUMBIA. }

THE INFORMATION of William K. Bull, of the City of Victoria, in the Province aforesaid, taken before me the undersigned, one of Her

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Majesty's Justices of the Peace in and for the said Province, at Victoria, in the said Province, this 21st day of May, in the year of Our Lord one thousand eight hundred and eighty-five, who saith that Wing Chong, *alias* Chu Lay, is a Chinese within the meaning of the "Chinese Regulation Act, 1884," and that the said Wing Chong, *alias* Chu Lay, is now within the Province, and found therein, to wit, at the City of Victoria, not having in his possession a licence issued under the provisions of the said Act lawfully issued to him the said Wing Chong, *alias* Chu Lay, contrary to the form of Statute in such case made and provided

(Signed) W. K. BULL.

TAKEN before me the day and year, and at the place above mentioned.

(Signed) EDWIN JOHNSON, P.M.

II. DEPOSITION OF WITNESS.

CANADA,
CITY OF VICTORIA,
PROVINCE OF BRITISH COLUMBIA. }

THE examination of William K. Bull, of Victoria, in the Province aforesaid, taken on this 1st day of June, in the year of Our Lord one thousand eight hundred and eighty-five, at Victoria, in the Province aforesaid, before the undersigned, one of Her Majesty's Justices of the Peace for the said Province, in the presence and hearing of Wing Chong, *alias* Chu Lay, who is this day charged before me, for that he, the said Wing Chong, *alias* Chu Lay, is a Chinese within the meaning of the "Chinese Regulation Act, 1884," and that the said Wing Chong, *alias* Chu Lay, is now within the Province and found therein, to wit, at the City of Victoria, not having in his possession a licence issued under the provisions of the said Act lawfully issued to him the said Wing Chong, *alias* Chu Lay.

This deponent, William K. Bull, upon his oath deposeth and saith as follows:—I have heard my information read and it is true. I am Collector under the "Chinese Regulation Act, 1884." I know the defendant. He is a Chinese over the age of 14 years. I applied to him on the 20th May for payment of \$10 for a licence under the Act. He refused to pay. He had no licence under the Act; he refused to take one out.

To Mr. Helmcken—Wing Chong is a general merchant. I have known the defendant about ten years. He is doing a large business. I believe there are about 2,000 Chinese in this City.

(Signed) W. K. BULL.

(Signed) J. D. ROBINSON,
C. P. C.

III. CONVICTION

CITY OF VICTORIA,
 PROVINCE OF BRITISH COLUMBIA, }
 To Wit:

BE IT remembered that on the 4th day of June, in the year of Our Lord one thousand eight hundred and eighty-five, at Victoria, in the said Province of British Columbia, Wing Chong, *alias* Chu Lay, is convicted before the undersigned, Edwin Johnson, Police Magistrate of the said city, and one of Her Majesty's Justices of the Peace in and for the said Province, for that he the said Wing Chong, *alias* Chu Lay, on the 21st day of May, in the year of Our Lord one thousand eight hundred and eighty-five, at Victoria, in the Province aforesaid, being a Chinese within the meaning of the "Chinese Regulation Act, 1884," was found not having in his possession a licence issued under the provisions of the said Act lawfully issued to him, contrary to the Statute in such case made and provided; and I adjudge the said Wing Chong, *alias* Chu Lay, for his said offence to forfeit and pay the sum of twenty dollars to be paid and applied, and in default of immediate payment recovered, according to law.

{ L. S. }

GIVEN under my hand and seal the day and year first above mentioned, at Victoria, in the Province of British Columbia aforesaid.

(Signed) EDWIN JOHNSON, P.M.

IV. REASONS FOR CONVICTION.

Tai Chong Yuen and Wing Chong, each charged that being a Chinese he was found in the Province not having in his possession a license under the "Chinese Regulation Act, 1884."

In this case I have had the great advantage of hearing the Attorney-General in support of the charge and Mr. Richards, Q.C., for the defence. The charge is proved, and indeed the facts alleged in it are not denied; but Mr. Richards claims that the Act is unconstitutional and void. So far as I know a defence of this character was never before raised in a Police Court.

The Act was passed more than a year ago, and received the assent of the Lieutenant-Governor, acting under the advice of his responsible Ministers, in Her Majesty's name. It has not been disallowed, and the time for disallowing it has expired. It would obviously be absurd for a Police Magistrate, on his own responsibility, to declare this or any other Act duly passed to be unconstitutional and refuse to act upon it; and I feel sure Mr. Richards recognizes this, although he was kind enough, in the course of his argument, to give me credit for perhaps more legal knowledge than I can fairly claim; but he says I am bound by the judgment of Mr. Justice Gray in 1878 declaring a somewhat similar Act void. (*Sing v. Maguire*, (S.C.B.C., September,

1878). There is no Judge in British Columbia whose decisions are entitled to more weight than Mr. Justice Gray's; but, in the first place, his judgment was not upon the Act now in question, nor upon one strictly identical with it; and in the next place, since 1878, the decisions of still higher Courts than the Supreme Court of British Columbia have, as the Attorney-General has pointed out, thrown new light on the construction of the "British North America Act," and it is possible that after reading those decisions, and particularly the case of *Hodge v. Reg.* (9 App. Ca. 117), the learned Judge might now come to a different conclusion.

It is my duty to administer the law as I find it, not as I may think it ought to be, leaving the grave questions that have been raised by Mr. Richards to be disposed of by a higher Court. I therefore convict each of the defendants of the offence charged, and fine him \$20, to be recovered, paid, and applied according to law.

(Signed) EDWIN JOHNSON, P.M.

CITY POLICE COURT, 4th June, 1885.

V. NOTICE OF APPLICATION FOR WRIT OF CERTIORARI.

In the Supreme Court of British Columbia.

In the matter of the "Chinese Regulation Act, 1884," and in the matter of Wing Chong, *alias* Chu Lay.

To Edwin Johnson, Esq., one of Her Majesty's Justices of the Peace and Police Magistrate in and for the City of Victoria and Province of British Columbia:—

Whereas you did on the fourth day of June, in the year of Our Lord one thousand eight hundred and eighty-five, take the examination of William K. Bull, and upon such examination as aforesaid did convict Wing Chong, *alias* Chu Lay, and sentence him to pay a fine of \$20. And whereas it appears that the Act, or part of the Act, under which the said conviction was made is unconstitutional and beyond the powers of the Provincial Assembly to enact, and moreover that the said conviction was irregular and illegal; wherefore the said Wing Chong, *alias* Chu Lay, being resolved to seek a remedy for the injury which he has received and sustained by means of the said conviction, I do hereby, on behalf of the said Wing Chong, according to the form of Statute in that case made and provided, give you notice that the Supreme Court, or a Judge thereof, will in six days from the time of your being served with this notice, or as soon thereafter as counsel can be heard, be moved on behalf of the said Wing Chong for a writ of *Certiorari* to issue out of the said Court and be directed to Edwin Johnson, Esq., for the removal of the said record into the said Supreme Court.

Dated 5th day of June, A.D. 1885.

(Signed) DRAKE, JACKSON & HELMCKEN,
Solicitors for WING CHONG.

VI. WRIT.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to Edwin Johnson, Esquire, one of Our Justices assigned to keep the Peace in and for the City of Victoria, and the Police Magistrate thereof, and also to hear and determine divers felonies, trespasses, and other misdemeanors committed within Our said City, GREETING,—

We being willing, for certain reasons, that all and singular informations, examinations, and depositions taken by and remaining with you in a certain case charged against Wing Chong, *alias* Chu Lay, for being without a licence under the provisions of the "Chinese Regulation Act, 1884," and for which you have convicted the said Wing Chong, *alias* Chu Lay, in the sum of \$20 as it is said, be sent by you before Us, do command you, that you send Us immediately after the receipt of this Our Writ, all and singular the said informations, examinations, and depositions, with all things touching the same, as fully and perfectly as they have been taken before you, and now remaining in your custody, by whatsoever name the said Wing Chong is called in the same, together with this Writ, that We may further cause to be done therein what of right and according to the law and custom of England We shall see fit to be done.

At Victoria the 3rd day of July, in the forty-ninth year of Our Reign.

By the Court.

(Signed) JAMES C. PREVOST,
Witness.

[L. S.]

VII. RECOGNIZANCE.

Be it remembered that on the _____ day of _____, in the year of Our Lord one thousand eight hundred and eighty-five, Wing Chong, of Victoria, British Columbia, and Tai Chong, of Victoria, aforesaid, personally came before me, the undersigned, one of Her Majesty's Justices of the Peace for the said City of Victoria, and severally acknowledged themselves to owe to our Lady the Queen the several sums following, that is to say: the said Wing Chong the sum of \$250 and the said Tai Chong the sum of \$250, of good and lawful money of Canada, to be made and levied of their goods and chattels, lands and tenements respectively, to the use of our said Lady the Queen, her heirs and successors, if he the said Wing Chong shall fail in the condition indorsed.

Taken and acknowledged the day and year first above mentioned, at Victoria before me.

Victoria, July 2nd, 1885.

(Signed) A. J. LANGLEY, J.P.

(Signed) TAI CHONG,

(Signed) WING CHONG.

The condition of the within written recognizance is such that if he the said Wing Chong shall prosecute with effect, without any wilful or affected delay, at his own proper costs and charges, a writ of *Certiorari*, issued out of the Supreme Court of our said Lady the Queen, at Victoria, British Columbia, to remove into the said Court all and singular records of conviction of whatever trespasses and contempts against the form of the Statute of the forty-seventh year of Her Majesty, intituled the "Chinese Regulation Act, 1884," made by Edwin Johnson, one of the keepers of the Peace and Justices in and for the said Province of British Columbia, and shall pay Edwin Johnson, within one month next after the said record of conviction shall be confirmed in the said Court, all his full costs and charges, to be taxed according to the course of the said Court, then the said recognizance to be void, or else to stand in full force and virtue.

Order Quashing Conviction.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

In the matter of Wing Chong, convicted at the City of Victoria, British Columbia, on the 4th day of June, 1885, by and before Edwin Johnson, Esquire, one of Her Majesty's Justices of the Peace in and for the Province aforesaid, and Police Magistrate in and for the said City of Victoria, for not having in his possession a licence issued under the "Chinese Regulation Act, 1884."

Friday, the 21st day of August, A. D. 1885.

Upon hearing on the 14th and 15th days of July, 1885, the Attorney-General for the Province of British Columbia, of Counsel for the said Edwin Johnson, Esquire, and upon hearing Mr. Drake, Q. C., Mr. Richards, Q. C., and Mr. Eberts, as of Counsel for the above named Wing Chong, and upon reading the rule *Nisi* made herein on the 15th day of June, 1885, this Court did order that the said matter should stand for judgment.

And this matter coming on this day for judgment in presence of Counsel for all parties, this Court doth order that the conviction of the said Wing Chong, on the 4th day of June, 1885, by and before the said Edwin Johnson, Esquire, one of Her Majesty's Justices of the Peace in and for the Province of British Columbia, and Police Magistrate for the said City of Victoria, at Victoria, for the alleged offence of not having in his possession a licence issued under the "Chinese Regulation Act, 1884," be quashed.

And this Court doth further order that the said Edwin Johnson do forthwith pay to the said Wing Chong, or his solicitor, the sum of

\$20, paid by the said Wing Chong under the said conviction, together with the costs of and incidental to this application to be taxed.

HENRY P. PELLEW CREASE, J.

Entered and issued this 13th day of January, A. D., 1886.

JAMES C. PREVOST,

Registrar.

[L. S.]

JUDGMENT OF MR. JUSTICE CREASE.

21st August, 1885—CREASE, J.:—

In order to deal satisfactorily with the questions raised by this appeal, it is necessary to see what is the scope and purport of the Act. It is called "An Act to regulate the Chinese population of British Columbia." It starts with a recital, in itself a *petitio principii*—not apparently the result of any public enquiry—which charges them with being not law-abiding, dissimilar in habits and occupation to the whites—useless in emergencies, habitual desecrators of grave-yards, unsuited to our laws, and of habits subversive of the community. From that premises concluding that special laws are required for their government, it proceeds to enact:—

1. The title.

2. Defines Chinese to mean "any native of the Chinese empire or "its dependencies not born of British parents, and shall include any "person of the Chinese race."

Section 3—with which we are immediately concerned—says:—"From and after the passage of this Act there shall be payable and "paid by every Chinese in British Columbia, above the age of fourteen "years, unto and for the use of Her Majesty, her heirs and successors, "the sum of ten dollars, and thereafter on the 1st day of June in each "and every year there shall be likewise payable and paid by such "Chinese person a further sum of ten dollars."

Sec. 4 provides for the appointment and payment of special collectors, "to be called Chinese collectors, to collect and receive such "payments from Chinese; and such collector or collectors, immediately "upon such payment, shall issue and deliver to the person paying the "same a license in the form contained in the schedule hereto."

By Sec. 5 "Any Chinese who shall be found within the Province not "having in his possession a license issued under the provisions of this "Act, lawfully issued to him, shall, on conviction thereof, forfeit and "pay a sum not exceeding forty dollars."

By Sec. 6 "Any collector or Government servant wilfully disobeying "any of the provisions of this Act shall forfeit and pay a sum not "exceeding one hundred dollars."

By Sec. 7 "Every collector shall collect the tax from each Chinese, "and shall as soon afterwards as may be pay over the amount to the

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"officer in charge of the Treasury, or to such other person as the Lieutenant-Governor in Council may from time to time direct."

By Sec. 8 "Every employer of Chinese shall furnish to the collector, when requested by him so to do, from time to time, a list of all Chinese in his employ, or indirectly employed by him; but no such statement shall bind the collector, nor shall excuse him from making due enquiry to ascertain its correctness."

Section 9. "In case any employer of Chinese fails to deliver to the collector the list mentioned in the preceding section, when required so to do, or knowingly states anything falsely therein, such employer shall, on complaint of the collector and upon conviction before a Justice of the Peace having jurisdiction within the district wherein such employer carries on his business, forfeit and pay a fine not exceeding one hundred dollars for every Chinese in his employ, to be recovered by distress of the goods and chattels of such employer failing to pay the same, or in lieu thereof shall be liable to imprisonment for a period not less than one month and not exceeding two calendar months."

Section 10 gives the collector power to "levy the amount of the license from any Chinese not being in lawful possession of a license with costs, by distress of his goods and chattels, or of any goods and chattels which may be in the possession of the delinquent, or which may be upon or in any premises (whether the goods of the delinquent or not) for the time being in the possession or occupation of such delinquent Chinese," and declares that "for the purposes of this section premises shall be deemed to be in the possession or occupation of any Chinese when it can be shown to the satisfaction of the tribunal having cognizance of the matter (a) that such Chinese habitually frequents such premises with the assent of the owner (b) that he is the owner or one of the owners of the premises, or has control, either alone or jointly, with another or others, of such premises or some part thereof; (c) that he has passed the night or slept upon such premises at any time within a week of the levy, it shall be sufficient authority for the collector to levy as aforesaid on the non-production of the license. Proof of the lawful possession of such receipt shall lie on the person whose goods are restrained."

By section 11 every license must be demanded by the employer and retained during the Chinaman's service.

By section 12 tax collectors are not to allow Chinese to pass unless a license is produced.

Section 13 imposes a penalty of \$50 on any person guilty of employing any Chinese not having a license.

Sec. 14. Fee for free miner's certificate to a Chinese to be \$15, instead of the white man's \$5.

Sec. 15. Penalty not exceeding \$30 for every Chinaman mining without a license.

Section 16 amends the License Ordinance of 1867, whereby the pursuit of various callings is sanctioned by the ominous words, "but no license shall be issued to any Chinese."

Sections 17 and 18 prevent the exhumation of dead bodies without permission, and prohibit the use of opium except for medical purposes.

Section 19 provides for the recovery of any pecuniary penalty thereunder in a summary manner before a J. P., and in default of immediate payment sanctions a distress, and failing that, imprisonment for not exceeding three months.

Section 20 (amended by Act of 1885) declares that "convictions are not to be quashed for want of form."

Section 21. "Any Chinese who shall lend his license or free miner's certificate to another Chinese, and any Chinese who shall utter or pass off upon any collector or other person any license or free miner's certificate other than his own, with intent himself to avoid payment of the license fee payable under this Act (and the onus of proving that such was not his intent shall rest upon the person charged), shall forfeit and pay a penalty of not less than twenty dollars nor more than one hundred dollars."

Section 22 enacts that the tribunal applied to may decide "on its own view and judgment" whether any person is a Chinese or 14 years old.

Sections 23, 24 and 25 contain sanitary provisions affecting buildings let to Chinese.

Section 26 provides a means whereby persons imprisoned for an infraction of the Act may be put to hard labour by an Order in Council, and the same executive authority is empowered to make rules and regulations for carrying out the Act.

Section 27 places in the hand of the local executive the construction from time to time of further rules and regulations to enforce the Act, and a fitting summary to such a premiss in section 28 reverses all the old law of England and one of the most cherished and priceless safeguards of the freedom from oppression won for us by our forefathers—that no one shall be deemed guilty until he has been proved so—throws on the defendant, white or yellow, the burden of proving that he is exempt from the operation of its arbitrary provisions—and in a tax Act which is in restraint of personal liberty, and opposed to the common law rights of the citizen—for if applicable to aliens it is a *fortiori* to the temporary inhabitants of the Province—abrogates the hitherto invariable rule in criminal matters and makes it unnecessary in any information, summons or conviction to "state or negative any exception in or exemption under this Act, or in contemplation of law!" Taught by experience of former efforts in the same direction, section 29 gives one year's notice of the coming into operation of the Act—a time which has now expired. And section 30 terms it merely "The Chinese Regulation Act, 1884."

The only schedule is the form of license, which runs as follows:—

		"CHINESE REGULATION ACT, 1884."			
"No.		District of		"Date	18 .
"Received of		, the sum of		dollars, being the yearly license,	
from the	day of	to the	day of	, 18 .	
"Collector."					

The question now raised on the construction of this Act affects not only British Columbia, but, as she occupies the only Pacific seaboard of the Dominion, indirectly more or less the very many other Provinces under the flag of confederation.

Taking for convenience the five points of objection to the conviction in the order in which they are made—

1. That it interfered with the Dominion powers under the B. N. A. Act over aliens and naturalization.
2. Trade and commerce.
3. Treaty obligations.
4. That the tax was unequal.
5. That it was indirect taxation and therefore illegal, and should be quashed.

On the first point, I would observe that it is now well settled law that British Columbia, as a part of the Dominion, possesses all, but possesses only, the powers which are strictly defined by the B. N. A. Act of 1867, which is, indeed, the constitution of Canada.

Neither she nor any other of the Provinces possess any other powers of legislation than are conferred by that Act. If British Columbia, or any other Province, in its legislation, goes beyond that Act and in excess of its provisions, that moment, and to the extent of such transgression, it ceases to be law. Therefore, in dealing with this question, our constitutional Act must be kept in view throughout, as the measure by which we must continually gauge the legality or illegality of the provisions of the local statute under consideration.

The Act of Federation was passed in order to be an irrefragable, permanent standard by which to preserve and regulate all the relative rights of the Provinces, as among themselves and as regards the Dominion.

The exclusive powers of that Act given to the Dominion over particular subjects are contained in the 91st section. The exclusive powers of the Province are particularized in section 92. It is natural that in the working out of such a constitution in a new and growing country, questions should be continually cropping up, and call upon the Courts to define gradually and with greater exactness, as time progresses and population expands, the relative powers given by the Act to the Dominion and Provinces respectively.

Sub-section 2 of section 91 gives to the Dominion Parliament exclusively the regulation of "trade and commerce," and by sub-

section 25 that of "naturalization and aliens," and everything relating to those subjects as affecting the whole Dominion is within the Dominion powers, and no local Legislature can make any statute interfering with either of those subjects. If it does, so far as such interference extends it is illegal and void, and when brought before the Court it is the duty of that tribunal so to adjudge it.

And the converse of this is true when applied to Dominion legislation as affecting the subjects exclusively given by the constitution to the Province.

Now, applying this test to the statute before us, let us see whether and how far its provisions affect, as is alleged, aliens, or trade, or commerce.

The aliens in this case being Chinese, the first enquiry must be, what is the object of the Act? On applying to the preamble, we find that it looks like a bill of indictment as against a race not suited to live among a civilized nation, and certainly does not prepare one for legislation which would encourage or tolerate their settlement in the country. Indeed, the first lines of the preamble sound an alarm at the multitude of people coming in, who are of the repulsive habits described in the last part of the preamble, and prepares one for measures which should have a tendency to abate that alarm by deterrent influences and enactments which should have the effect of materially lessening the number of such undesirable visitors. The provisions of the Act I have given somewhat *in extenso* bear out that view, and the concurrent and previous local legislation bear out the same impression, for on the same day as this Act was passed, another Act was passed, the very object of which was plainly stated to be "to prevent the immigration of Chinese."

That Act was disallowed. It interfered with aliens as well as trade and commerce, which cannot subsist among nations without personal intercourse, which such an Act (as far as China was concerned) would have a tendency to prohibit.

Another statute (of 1878), "An Act to provide for the better collection of taxes from Chinese," which contained several of the stringent provisions which I have described in this Act, such as a special tax specially recoverable by summary and unusual remedies from the Chinese alone, in British Columbia, and enforced by fine and imprisonment and other penal clauses, came before this Court, and in a most conscientious and exhaustive judgment of Mr. Justice Gray, of 23rd September, 1878, in the case of *Tai Sing v. Maguire*, was declared unconstitutional and *ultra vires* the Local Legislature, as interfering with aliens and trade and commerce—matters reserved exclusively under the 91st section of the B. N. A. Act to the Dominion. That decision was never appealed from, and was at once acted on by the government as conclusive.

The position and legislative powers of British Columbia have been

in no respect altered in its relations to the legislative powers of the Dominion on the same subjects since that time, though *Russell v. The Queen* (7 App. Cas. 829) and *Hodge v. The Queen* (9 App. Cas. 117) have more fully defined the extent of the powers of the Provincial Legislatures than has hitherto been done; and in the latter case especially. That decision, however, was not before Mr. Gray when he rendered the judgment in *Tai Sing v. Magwire*. Until reversed or varied, the decision in the *Hodge* case is law here, and binding on this Court.

Their lordships say (page 132), with reference to the objection of the appellants there (*delegatus non potest delegare*):—

"It appears to their lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the Provincial Legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a Legislature for Ontario" (for this case, we may for "Ontario" read "British Columbia"), "and that its Legislative Assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the Local Legislature is supreme."

[So far this decision confirms the words of Lord Selborne in *R. v. Burah*; what follows goes beyond it.] "And has the same authority as the Imperial Parliament or the Parliament of the Dominion would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect."

That decision, although in some respects an *obiter dictum*, as regards this case, makes it clear that within the limits of subjects and the area prescribed by the B. N. A. Act, by section 92, the Legislature of British Columbia is supreme. The basis, then, of our enquiry must be: Is this Chinese Regulation Act of 1884—rather are the parts of it objected to—within the limit of subjects and area of section 92, or does it exceed those limits in which it is supreme, and interfere with aliens, trade and commerce in such a manner as to encroach on section 91 or any of its sub-sections? If so, so far as it does so, it is unconstitutional and *ultra vires*, and therefore void. Now it does not follow because a local Act touches on these three subjects it therefore interferes with them so as to render it unconstitutional.

Aliens may be taxed, may be subjected to the same rules and muni-

principal and other by-laws as other inhabitants of British Columbia, and such discriminations in so doing as are allowed in local legislatures between and among different persons and occupations among the whites are quite as applicable to them. These are the only discriminations which the law allows, and these are the permissible discriminations spoken of by Cooley in the portions cited before the Court. During the argument the case of *Lin Sing v. Washburn*, 20 California Reports, 534, was quoted as bearing on this case. There, the California Legislature passed an Act imposing a capitation tax "on each person, male and female, of the Mongolian race of the age of 18 years and upwards residing in the State," accompanying a license almost a *fac simile* of our own, and enforced in much the same way as in the case before us. That, after long and elaborate argument in which the Attorney-General appeared for the State, was determined to be unconstitutional, as it was an interference with trade and commerce, which could be regulated alone by the general government. It was in vain advanced that at least the State had concurrent jurisdiction in matters of taxation relative to its own internal affairs, of which this was one (the same proposition as was advanced by the Attorney-General in this case) in which it had a supreme and autonomous right to legislate. And the grounds of this decision were that the federal constitution had vested in the general government the power to regulate commerce in all its branches (as with us in the Dominion); and this power extends to every species of commercial intercourse, and may be exercised upon persons as well as property (Mr. Justice Field, whose arguments have been reproduced by the Attorney-General before me in this case, dissenting).

That commerce cannot be carried on without the agency of persons, and the tax, the effect of which is to diminish personal intercourse, is a tax on commerce. If the power to impose such a tax is acknowledged, it being a sovereign power, no limitation can be affixed to its exercise, and it may be so used as not only to diminish but destroy commerce.

The power asserted in the Act in question (the California Act) viz., the right of the State to prescribe the terms upon which the Chinese shall be permitted to reside in it, may be so used as to cut off all intercourse between them and the people of the State, and defeat the commercial policy of the nation.

That the Act could not be maintained as a police regulation; that branch of the police power had been surrendered to the Federal Government as a part of the power to regulate commerce, and its exercise by a State was incompatible with the authority of the Government.

That the Chinese might be taxed as other residents, but could not be set apart as special objects of the taxation, and be compelled to contribute to the revenue of the State in the character of foreigners.

The reports of the higher California courts are of great authority

for us on all Chinese questions, for there have been efforts for years past to restrict Chinese immigration in California, and the matter has been constantly before the superior courts there, and the judges there (if we may take the reports as correct) are more than ordinarily skilled in laying down the law correctly in constitutional points of that nature. Indeed, there is no other country which has such experience generally in constitutional law as applicable to a federation of states.

Of course, in all the observations I make I recognize the now well-known distinction between the relations of a State of the Union to the Federal Government, and our relation as a Province to the Dominion. Still both Federal Governments have reserved to themselves the regulation of trade and commerce and naturalization and aliens; so the analogy is so close as to become almost a direct authority.

In the *Lin Sin* judgment, p. 579, the learned judge says of the power of taxing foreigners, as in the present *qua* foreigners: "If the power exist it may be exercised upon all foreigners residing in the State, and may be so exercised as to bar the door of foreign commerce as effectually as the Government could do by issuing its mandate and closing its ports."

And again "to determine whether there is a conflict or not," *i. e.*, of jurisdictions, "the power must be considered with reference to its consequences, for its effect when carried out is the only criterion by which a judgment can be formed."

In another place he says—"It would be an empty sound to say that the several States cannot pass any law to prevent foreigners from coming here if they may pass laws which will compel such foreigners to depart as soon as they arrive."

And again, "A tax imposed by the law on these persons for the mere right to reside here, is an appropriate and effective means to discourage the immigration of the Chinese into the State."

During the argument on the case before me, the Attorney-General claimed that this was direct taxation, and a direct tax within the Province, to raise revenue for Provincial purposes, and, therefore, *intra vires*; but the question is not one of name but of fact. Does it interfere with trade or commerce? Can it be legally imposed on foreigners as foreigners, for even a legal tax in other respects becomes illegal when it goes beyond its proper limits, and interferes with powers exclusively given to the Dominion for the benefit of all?

In another California case, *In re Tiburcio Parrott*, it is laid down that if the apparent object of a statute is under a pretense of the exercise of constitutional powers to drive Chinese away, the end sought to be obtained being unlawful, the statute is void.

In *Russell v. Reg.* it is decided that the true nature and character of legislation must be determined in order to ascertain its legality.

In *Citizens Insurance Co. v. Parsons*, we have to look at the legislation for the same purpose.

If the legislation here be to drive people from the country, have the local legislature the power? Legislation as to aliens is reserved to the Dominion. And as to trade and commerce, if the Chinese be driven out an annual loss to the revenue, it appears by the tables in the Chinese Commission Report, of \$110,000 will take place; and more than \$1,500,000 of property and business be lost to us, besides an injury to trade to an incalculable extent. The amount of business transacted by Chinamen in British Columbia, as revealed by the tables in that Chinese Report, is something which a casual observer could have no idea of.

The treaties between Great Britain and China, which bind us, have been quoted. The treaty of 25th August, 1842, *Hertslet*, Vol. 6, ratified 26th June, 1843, p. 221, and Lord *Elgin's* treaty of October, 1860, authenticated copies of which were produced in Court, secure to Chinese coming into British dominions the same "full security for persons and property as subjects of Her Majesty."

Vattel, cap. 8, referring to our obligations to foreigners, observes:—"As soon as the lord of the territory admits strangers into it he engages to protect them as his own subjects, and to afford them perfect security as far as depends on him."

Reg. v. Severn and *Reg. v. Russell* are important authorities in guiding our enquiry as to the nature and effect of local legislation in determining whether and how far the Act under review exceeds the limits within which the local legislature is supreme. And as to the equality of taxation, besides *Cooley*, who has been quoted freely on both sides, in *Kent's Commentaries* (8th Ed.), 2nd Vol., 388, it is insisted—"That every person is entitled to be protected in the enjoyment of his property, not only from invasions of it by individuals, but from all unequal and undue assessments on the part of the Government. It is not sufficient that no tax or imposition can be imposed upon the citizens, but by their representatives in the legislature the citizens are entitled to require that the legislature itself shall cause all public taxation to be fair and equal in proportion to the value of 'property'" (and that is what *Cooley* means by apportionment of taxation), "so that no class of individuals, and no species of property shall be unduly assessed." The treaties I have quoted between Great Britain and China, binding on the Dominion and on us in British Columbia, secure to the Chinese, just as the treaties between Great Britain and other foreign countries secure to other foreigners, the same rights in regard to the equality of taxation which I have described as being enjoyed by citizens of this country.

These treaties have the force of international law, and are construed most strongly against the party for whose benefit they are introduced.

In the case of the Chinese treaties, they were forced by us at the point of the bayonet on China, to obtain a right for us to enter China, and in return for a similar permission to us, full permission was given for the Chinese to trade and reside in British dominions everywhere.

In the treaties of 1858 and 1860, made at the solicitation of Great Britain, the Emperor of China was induced to give permission to his subjects to go and trade and reside "in British Colonies," and to enter into "engagements with British subjects for that purpose."

These obligations are binding here and in other parts of the Dominion, under section 132 of the British North America Act, and no Province, or the Dominion itself, can lawfully pass laws interfering with that right without a previous revision of the treaties by the high contracting parties to them for that purpose. Treaties with foreign nations are above all ordinary municipal law, for obvious international reasons, for without such a provision there can be no permanent security, which is the life of all commercial intercourse. The same provisions that apply to Chinese may be made to apply also to Americans, Frenchmen, Germans, or any other foreigners. Such treaties are the especial care of the Dominion, and where local legislation clashes with that especial province of the Dominion, the legislation of the Province must give way, as laid down in *Leprohon v. the City of Ottawa*, 40. Q. B., Ont., 478; *Reg. v. Chandler*, *Hannay's New Brunswick Reports*, 548; *Dow v. Black*, L. R. 6 P. C. 272; *L'Union St. Jaques v. Belisle*, L. R. 6 P. C. 31, and numerous other Canadian authorities, besides the British North America Act itself. Now applying the principles and tests I have described to the Act before us, what do we find? The Act is found associated with another Act now disallowed, the express object of which is to prevent the Chinese altogether from coming to this country, and the principle "*noscitur a sociis*" is kept up by the preamble of the present Act, which describes the Chinese in terms which, I venture to think, have never before in any other country found a place in an Act of Parliament.

In the definition of the persons affected by the Act no distinction is made of ambassadors, merchants, consuls, artists, professors or travellers, or sex, whether under disability or not, or at such a distance from a collector as to make it difficult or impossible to obtain a license. Every person of Chinese origin, whether naturalized in Hong Kong or America, or any other State with which we are at amity, so long as they are of Chinese origin, 14 years of age,—every one without distinction—must take out a license. For the purpose of argument I have treated the license fee as a tax; but it is in fact a license—a license to remain in British Columbia unmolested for a year. When the legislature wanted to create a tax, they knew what words to use for the purpose, for in the sister Act passed on the same day, which was disallowed, they called the impost there enacted a "tax," not a license. However difficult or impossible for any Chinese to find a district collector, if such Chinese

is "found without a license he is liable to a fine of \$40." At every turn he is confronted with an exceptional duty, and an exceptional penalty, and the loss of his goods and chattels, and of personal liberty.

It is impossible but that such an imposition so enforced, in addition to all the general taxes to which he is subject, should make this country too hot for him to live in; and just in proportion as he is so persecuted out of the country, in that degree does this enactment interfere with trade and commerce and that control over aliens exclusively given to the Dominion. And not only is he thus attacked, but unheard of provisions are introduced. Every employé of Chinese labour, whether English, American, or what not, is made liable to severe and incessant liability of a penal kind, for what? Some act, a default of his own? No; an act or default of a stranger, a man whose language he knows not, and for every infraction of the Act by the Chinese under his employ. The palpable object of such a provision, or set of provisions, is to render the employment of Chinese so distasteful and annoying to the employer that he must cease to employ them. Now, to pass a law providing that employment shall not be given to a special class of men, except it be productive of so much danger, annoyance, and loss to the employer, is just another way of saying that no intercourse shall be had with that class. With penalties and prosecutions always before you, far in excess of any advantage to be derived from that intercourse or trade, what is that but equivalent to saying that such intercourse or trade or labour must cease altogether? What is that but interfering with aliens, trade, and commerce?

If a man employ a Chinaman who should happen to be delinquent in his tax, and he happens to occupy a cottage or room of his employer, with his master's goods in it, under section 10 they are liable to seizure and sale. In every prosecution under the Act the legal presumption of innocence until conviction is reversed; in every case the *onus probandi*, though in a Statute highly penal, is shifted from the informant on to the shoulders of the accused, and he a foreigner not knowing one word of the law, or even the language of the accuser. In other words, every Chinese is guilty until proved innocent—a provision which fills one conversant with such subjects with alarm; for if such a law can be tolerated as against Chinese, the precedent is set, and in time of any popular outcry can easily be acted on for putting any other foreigners, or even special classes among ourselves, as coloured people, or French, Italians, Americans, or Germans, under equally the same law. That certainly is interfering with aliens.

The proposition that it is a Provincial tax for revenue purposes, supposing it to be so intended under the provisions of the Act, is so manifestly calculated to defeat that object, by diminishing the numbers of the members of the persons to be affected by it, that it is difficult to regard it in that light, or in any other light than an indi-

rect mode of getting rid of persons whom it affects out of the country. The whole Act teems with special provisions which affect not only Chinese, but their employers, with obligations and liabilities as to the conduct of the Chinese in their employ, that no reasonable man would encounter, and run the risk of the penal consequences which the Act hangs over him.

For instance, by section 19 any pecuniary penalty imposed may be summarily recovered (and applies to employers), and in default of immediate payment the same may be recovered by distress of the goods and chattels of the offender, and in default of sufficient distress by a liability to imprisonment for three calendar months, and the employers would necessarily be white men.

In fact, the Act so bristles with these arbitrary, exceptional and penal consequences, that it is invidious to single out particular ones for comment. It is enough to add that "any person," no matter whether white or Chinese, imprisoned in respect of any infraction of the provisions of the Act, may be at the will of the executive, subjected even to hard labour.

The Act is so full of provisions that interfere directly with aliens, with trade, and with commerce, that I have no hesitation in pronouncing all such provisions, and among them those under which the appellant in this case has been convicted, to be *ultra vires* the local legislature, and consequently illegal and void.

So far, I have dealt with the Act on its own merits; but if we consider it in juxtaposition to the Dominion Act recently passed restricting the Chinese throughout all Canada, its illegality becomes transparent; for in passing that Act against the Chinese the Dominion has spoken by the highest authority which it possesses—its own Parliament. By the Constitutional Act the subject of aliens, we have seen, is specially reserved to the Dominion, and it is now an axiom, in the interpretation of that Act, that when that authority deals with a subject expressly included in its jurisdiction by the 91st section, it has possession of that subject exclusively, and the Province has to give way. It is a great assumption of power on the part of a Province to pass laws, the effect of which must be practically to expel a particular class of aliens from that Province, to say in effect that it will by its legislation impede or prevent that class from being employed in another Province—say the North-west Territory or Manitoba—where railway works may be languishing for want of that very class of labourers, British Columbia being the only sea-board of Canada on the Pacific through which (in face of the restrictive laws of the United States) that class of labourers can enter and pass through; that is, in fact, legislating on all inter-provincial immigration; in other words, such legislation is *ultra vires*, and so I pronounce it; and adjudge accordingly, and quash the conviction, with costs.

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